No. 05-493

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN ORNASKI, WARDEN, PETITIONER

v.

FERNANDO BELMONTES, RESPONDENT

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Fernando Belmontes, through his attorney Eric S. Multhaup, hereby opposes the Petition for Writ of Certiorari filed on behalf of Steven Ornaski, Warden, California State Prison at San Quentin.

Respondent has no objection to those sections of the petition entitled "Opinion or Judgment Below," "Statement of Jurisdiction," or "Relevant Constitutional Provisions and Statutes," except that Respondent did invoke and did obtain relief in reliance on the Fourteenth Amendment as well as the Eighth Amendment, see Petitioner's Appendix, p. 291a. Respondent does object to the rhetorical characterization of the offense at pp. 2-3. Respondent does not object to the portion of the petition entitled "State Court Proceedings" as far as accuracy, and will supplement the references contained in that section as needed in the opposition below.

Respondent disagrees that the decision of the Ninth Circuit Court of Appeals presents either of the two "Questions Presented," as set forth in the Petition for Writ of Certiorari. To the contrary, the Ninth Circuit decision applies the settled law of this Court to the particular facts of this case to reach a constitutionally irreproachable result.

ARGUMENT

I. THE NINTH CIRCUIT DID NOT MISCONSTRUE OR MISAPPLY BOYDE V. CALIFORNIA, 494 U.S. 370 (1990), OR BROWN V. PAYTON, 544 U.S. 133, 125 S.Ct. 1432.

Petitioner argues that "the Ninth Circuit's opinion is irreconcilable with this Court's holding in Boyde," Petition, p. 10, but this assertion is

unsupportable. This Court remanded the Ninth Circuit's prior opinion for re-consideration in light of Brown v. Payton, 544 U.S. 133, 125 S.Ct. 1432 (2005), and the Ninth Circuit did just that, paying close attention to the Payton decision– "Having carefully reviewed Payton, and our previous independent determination of the constitutional question at issue, we find no reason to change our judgment on the matter," Belmontes v. Brown, 414 F.3d 1094, 1102 (2005); see Appendix, p. 233a.

The Attorney General's argument is virtually identical to the argument he previously made following the 2003 decision of the Ninth Circuit, i.e., that the decision conflicts with Boyde, supra, and is barred by Teague v. Lane, 489 U.S. 288 (1989). The crux of the Boyde decision was that "[a]pplying this standard to factor (k) of CALJIC 8.84.1 standing alone, we think there is not a reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character." 494 U.S at 381 (emphasis supplied).

The Ninth Circuit opinion at issue here did not find that factor (k) "standing alone" created a reasonable likelihood that the jurors believed they were precluded from considering respondent's mitigating evidence. To the contrary, the Ninth Circuit concluded that a constellation of misleading

instructions, primarily occurring during the crucible of jury deliberations, in combination misled the jury as to the correct consideration of mitigating evidence:

> We hold that there is a reasonable probability that, as a result of the court's instructions, the jury in Belmontes' case did not consider his principal mitigating evidence. The trial judge began by giving a faulty instruction, one that on its face arguably does not allow consideration of mitigating evidence pertaining to the defendant's probable future good behavior in prison, as opposed to his culpability for the crime. He then rejected a significant part of the supplemental instruction that Belmontes proposed in an effort to solve the problem. The jurors were understandably confused, and they asked questions of the court in an effort to clarify the scope of their duty. In the course of that dialogue, the trial judge endorsed Juror Hern's view of the instructions, a view that strongly suggested that the jury could consider, weigh, and balance only "those certain factors" that appeared in "the listing." Following that endorsement, the trial judge advised the jury without further explanation that, in making its decision, it could not consider the possibility that Belmontes could receive psychiatric treatment in prison. In sum, every instruction that the jury received tended to convey the message that the jury could not consider Belmontes' mitigating evidence unless it related to his culpability for the crime. Under these circumstances, there is, at the least, a reasonable probability that the jury did not consider Belmontes' principal mitigation evidence--the evidence that provided the factual support for his argument in mitigation: that he would live a productive life if permanently incarcerated in a structured environment. Belmontes v. Brown, 414 F.3d 1094, 1138 (9th Cir. 2005) (emphasis supplied).

The Attorney General characterizes the decision as one that rested solely on a claim of instructional error based on the factor (k) instruction, and never addresses the erroneous instructions given in response to specific questions

posed by jurors Hern and Hailstone during deliberations. The Ninth Circuit addressed those questions and the erroneous responsive instructions in detail, see Appendix, pp. 295a to 299a. In contrast, the Attorney General glosses over this entire discussion with the dismissive comment that "[t]he Belmontes majority also finds the trial judge somehow 'compounded the problem' with his informal answers to juror questions during deliberations," but that "[f]or the reasons discussed, however, there simply was no 'problem' to compound," Petition, p. 19.

The Attorney General further fails to acknowledge that the sole claim of instructional error in Brown v. Payton, 544 U.S. 133 (2005) was limited to the asserted deficiencies in factor (k) of CALJIC 8.81.7, and this Court specifically noted that after receiving the factor (k) instruction, the jury "was not thereafter instructed to disregard anything." 125 S.Ct. at 1441. In this case, the trial court's supplemental instructions to the jury did in effect "instruct [them] to disregarding anything" that was not a statutory mitigating factor, and the Ninth Circuit relied on those misinstructions as a significant component of the constitutional error:

> Juror Hern's questions reveal that she did not understand that her duty as a juror was to consider all of Belmontes' mitigating evidence. The most reasonable way to interpret her first question is

> as an effort to clarify that the jury should look to the statutory factors (a) through (g) [or unadorned (k)], as read to the jury by the trial judge, to determine what counted as aggravating and mitigating circumstances. It appears that by asking, "that was the listing?," Juror Hern wanted confirmation that there was a finite list of factors for the jury to consider and that the list consisted of the statutory factors read to the jury by the judge. This interpretation is reinforced by Juror Hern's next question: "Of those certain factors, we were to decide one or the other [e.g., whether the evidence is aggravating or mitigating] and then balance the sheet?" The structure of this question separates the "certain factors" that appear in "the listing" from other factors that may not be reflected there. It makes it clear that at least one juror believed that the jury should consider, weigh, and balance only "those certain factors" that appeared in "the listing." Of course, such a belief would have been incorrect; the jury was required to consider and evaluate Belmontes' mitigating evidence relating to his potential adjustment to life in prison regardless of the fact that it was not listed in the statute. 414 F.3d at 1136.

The trial court's answers to Juror Hern's questions would have adversely affected all of the jurors, and would the trial court's subsequent response to Juror Hailstone's questions. The Ninth Circuit decision was corrected decided and entirely consistent with both Boyde and Payton because the trial court made multiple, reinforcing and compounding instructional errors, which were not present in either Boyde or Payton.

In sum, the Attorney General would have this Court grant certiorari based on an inaccurate characterization of the ratio decidendi of the Ninth Circuit. Respondent urges the Court to deny certiorari because the Ninth

Circuit's ruling faithfully applied this Court's precedents from Lockett v. Ohio, 438 U.S. 506 (1978), through Eddings v. Oklahoma , 455 U.S. 104 (1984), Skipper v. South Carolina, 476 U.S. 1 (1986), and up to and including Payton, supra. See Belmontes, supra, at 1131 – 1133.

II. THE NINTH CIRCUIT RELIED ON THE SETTLED LAW OF THIS COURT IN COMPLETE COMPLIANCE WITH TEAGUE V. LANE, 489 U.S. 288 (1989).

The Attorney General's second argument is that the Ninth Circuit opinion "rests on a new rule in violation of Teague," Petition at p. 21. To the contrary, the result reached by the Ninth Circuit depends not on a new rule fashioned from Boyde v. California supra, but from the longstanding prior authority of Eddings v. Oklahoma, supra, Lockett v. Ohio, supra, and Skipper supra. The basic constitutional principle relied on by the Ninth Circuit was that the "Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate," 414 F.3d at 1131, a well-settled principle that long pre-dated the decision of the California Supreme Court in 1989.

Perhaps the clearest indicator of the flaw in the Attorney General's argument is that this Court remanded to the Ninth Circuit for reconsideration in light of Payton, not reconsideration in light of Teague. Particularly since the

Attorney General made this unavailing argument in his 2004 petition for certiorari, and since the Attorney General offers no additional argument responsive to the ineluctable fact that the Ninth Circuit opinion expressly cited and relied on pre-existing precedent noted above, there is no basis for granting certiorari on this question.

CONCLUSION

The crux of this Court's ruling in Payton was that under the deferential standard of review imposed by 28 U.S.C. section 2254(d)(1) of the A.E.D.P.A., the decision of the California Supreme Court, wrong as it may have been, was not "objectively unreasonable," and therefore precluded federal habeas corpus relief – "Even on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review." Payton, 125 S.Ct. at 1439. In contrast, this is a pre-AEDPA case, and the standard of review is substantially different, as the Ninth Circuit panel pointed out – "The issue here is not the AEDPA issue that the Court confronted in Payton, but whether the state court engaged in an 'incorrect' application of federal law," 414 F.3d at 1101. The Ninth Circuit applied that standard of review to a case specific set of facts, and reached a constitutionally irreproachable result. There is no basis to grant certiorari in this case.

Wherefore, for the foregoing reasons, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: January 26, 2006

Respectfully submitted,

ERIC MULTHAUP, Attorney for
Respondent FERNANDO BELMONTES

CERTIFICATE OF WORD COUNT

I certify that this Opposition to Petition for Writ of Certiorari consists of 2197 words.

Dated: January 26, 2006

ERIC S. MULTHAUP

DECLARATION OF SERVICE

RE: Steven Ornaski, Warden vs. Fernando Belmontes

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached:

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on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
Attn: Mark Johnson, Esq.
P. O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury that service was effected on January 26, 2006 at Mill Valley, California and that this declaration was executed on January 26, 2006 at Mill Valley, California.

ERIC S. MULTHAUP